

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Michael Derrick Simmons,) C/A No. 0:11-2542-JMC-PJG
vs.)
Plaintiff,)
vs.)
T. Robertson, *Officer*,)
D. Haronff, *Officer for SCDC*,)
Defendants.)

)

**REPORT AND
RECOMMENDATION**

The plaintiff, Michael Derrick Simmons, ("Simmons"), proceeding *pro se*, brings this action pursuant to 42 U.S.C. § 1983. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) DSC. Plaintiff is an inmate at the Perry Correctional Institution of the South Carolina Department of Corrections ("SCDC"), and files this action *in forma pauperis* under 28 U.S.C. § 1915. Having reviewed the Complaint in accordance with applicable law, the court concludes that it should be summarily dismissed.

BACKGROUND

Plaintiff is serving a sentence of twenty years for first-degree burglary and three counts of attempted armed robbery. The two defendants in this case are correctional officers at the Perry Correctional Institution.

The "STATEMENT OF CLAIM" portion of the § 1983 Complaints reveals that Plaintiff is raising two issues in this civil rights action: (1) Plaintiff has not been validly convicted; and (2) on August 24, 2011, Defendant Robertson took Plaintiff's food tray away because Plaintiff's hair was not in compliance the grooming policy at the Perry Correctional Institution, and then both Defendant Robertson and Defendant Haronff forced Plaintiff to get a haircut.

Plaintiff's answers on page two of the Complaint indicate that Plaintiff has not filed a grievance on the matters raised in the Complaint, even though there is a grievance procedure available at the Perry Correctional Institution. In his prayer for relief, Plaintiff seeks two hundred fifty thousand dollars (\$250,000) from each defendant. Plaintiff's exhibits (ECF No. 1-1) include various letters from Plaintiff to SCDC officials contending that he has not been validly convicted and that he should not be in prison.

INITIAL REVIEW GENERALLY

Under established local procedure in this judicial district, a careful review has been made of the *pro se* complaint pursuant to the procedural provisions of 28 U.S.C. § 1915, 28 U.S.C. § 1915A, and the Prison Litigation Reform Act ("PLRA"), Pub. L. No. 104-134, 110 Stat. 1321 (1996). This review has been conducted in light of the following precedents: Denton v. Hernandez, 504 U.S. 25 (1992); Neitzke v. Williams, 490 U.S. 319, 324-25 (1989); Haines v. Kerner, 404 U.S. 519 (1972); Nasim v. Warden, Md. House of Corr., 64 F.3d 951 (4th Cir. 1995) (*en banc*); Todd v. Baskerville, 712 F.2d 70 (4th Cir. 1983); Loe v. Armistead, 582 F.2d 1291 (4th Cir. 1978); and Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978).

The Complaint has been filed pursuant to 28 U.S.C. § 1915, which permits an indigent litigant to commence an action in federal court without prepaying the administrative costs of proceeding with the lawsuit. To protect against possible abuses of this privilege, the statute allows a district court to dismiss the case upon a finding that the action "fails to state a claim on which relief may be granted," "is frivolous or malicious," or "seeks monetary relief against a defendant who is immune from such relief."¹ 28 U.S.C.

¹ Screening pursuant to § 1915A is subject to this standard as well.

§ 1915(e)(2)(B). A finding of frivolousness can be made where the complaint “lacks an arguable basis either in law or in fact.” Denton, 504 U.S. at 31. Hence, under § 1915(e)(2)(B), a claim based on a meritless legal theory may be dismissed *sua sponte*. Neitzke, 490 U.S. 319; Allison v. Kyle, 66 F.3d 71 (5th Cir. 1995).

This court is required to liberally construe *pro se* complaints. Erickson v. Pardus, 551 U.S. 89, 94 (2007). Such *pro se* complaints are held to a less stringent standard than those drafted by attorneys, *id.*; Gordon v. Leeke, 574 F.2d 1147, 1151 (4th Cir. 1978), and a federal district court is charged with liberally construing a complaint filed by a *pro se* litigant to allow the development of a potentially meritorious case. Hughes v. Rowe, 449 U.S. 5, 9 (1980); Cruz v. Beto, 405 U.S. 319 (1972). When a federal court is evaluating a *pro se* complaint, the plaintiff's allegations are assumed to be true. Erickson, 551 U.S. at 93 (citing Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-56 (2007)).

Nonetheless, the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleading to allege facts which set forth a claim cognizable in a federal district court. See Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990); see also Ashcroft v. Iqbal, 129 S. Ct. 1937, 1953 (2009) (outlining pleading requirements under Rule 8 of the Federal Rules of Civil Procedure for “all civil actions”). The mandated liberal construction afforded to *pro se* pleadings means that if the court can reasonably read the pleadings to state a valid claim on which the plaintiff could prevail, it should do so; however, a district court may not rewrite a complaint to include claims that were never presented, Barnett v. Hargett, 174 F.3d 1128 (10th Cir. 1999), construct the plaintiff's legal arguments for him, Small v. Endicott, 998 F.2d 411 (7th Cir. 1993), or “conjure up questions never squarely presented” to the court, Beaudett v. City of Hampton, 775 F.2d 1274, 1278 (4th Cir. 1985).

DISCUSSION

Plaintiff's claims relating to his convictions for first-degree burglary and attempted armed robbery are subject to summary dismissal under the holding in Heck v. Humphrey, 512 U.S. 477 (1994), which states:

We hold that, in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such a determination, or called into question by a federal court's issuance of a writ of habeas corpus, 28 U.S.C. § 2254. A claim for damages bearing that relationship to a conviction or sentence that has not been so invalidated is not cognizable under § 1983. Thus, when a state prisoner seeks damages in a § 1983 suit, the district court must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated.

Heck v. Humphrey, 512 U.S. at 486-87 (footnote omitted). Until Plaintiff's conviction is set aside, any civil rights action based on the conviction, sentence, direct appeal, and related matters will be barred because of the holding in Heck v. Humphrey.²

The Prison Litigation Reform Act, 42 U.S.C. § 1997e(a), provides that “[n]o action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.” In his Complaint,

² In Plaintiff's prior habeas corpus action filed pursuant to 28 U.S.C. § 2254, the Honorable Patrick Michael Duffy, Senior United States District Judge, granted summary judgment to the Respondent on March 26, 2009. See Simmons v. Bazzle, C/A No. 0:08-1028-PMD-PJG, 2009 WL 823302 (D.S.C. Mar. 26, 2009). The United States Court of Appeals for the Fourth Circuit dismissed the subsequent appeal (Fourth Circuit Docket No. 09-6787) and the Supreme Court of the United States denied discretionary appellate review. See Simmons v. Bazzle, No. 09-6787, 332 Fed.Appx. 149 (4th Cir. July 30, 2009), cert. denied, 130 S.Ct. 629 (2009).

Plaintiff stated that there is a prisoner grievance procedure at the Perry Correctional Institution and that he did *not* file a grievance. Plaintiff has an available administrative remedy relating to the taking of the food tray and forced haircut on August 24, 2011.

The Supreme Court of the United States has held that, “the PLRA’s exhaustion requirement applies to all inmate suits about prison life, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong.” Porter v. Nussle, 534 U.S. 516, 524 (2002); see Booth v. Churner, 531 U.S. 956 (2001) (PLRA requires administrative exhaustion even if grievance procedure does not allow monetary damages and prisoner seeks only monetary damages, so long as grievance tribunal has authority to take some responsive action). Although the lack of exhaustion of administrative remedies is considered an affirmative defense and not a jurisdictional infirmity or a pleading requirement, if the lack of exhaustion is clearly apparent from the face of the prisoner’s complaint, *sua sponte* dismissal prior to service of the complaint may be appropriate. See Jones v. Bock, 549 U.S. 199 (2007) (finding that inmates are not required to specially plead or demonstrate exhaustion in their complaints); Anderson v. XYZ Corr. Health Serv., 407 F.3d 674, 683 (4th Cir. 2005) (noting that it is possible that a prisoner’s complaint may clearly show that the prisoner has not exhausted his administrative remedies and under those circumstances *sua sponte* dismissal would be appropriate); cf. Eriksen Co. S.A. v. Johnson, 440 F.3d 648, 655-56 (4th Cir. 2006) (*in forma pauperis* proceedings “implicate important judicial and public concerns not present in the circumstances of ordinary civil litigation.”).

An SCDC inmate must usually wait approximately 125 days from the time he or she initiates a grievance until final disposition. See SCDC Inmate Grievance System Policy issued on September 1, 2009. This time period gives the prison administrators a chance

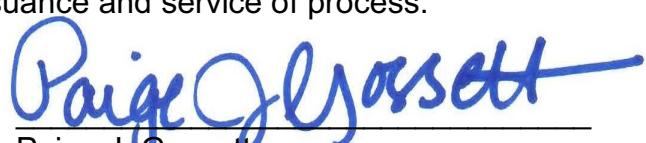
to resolve the matter without implicating judicial oversight of prison administration which is disfavored. The decision of the “responsible official” who answers the Step 2 appeal is the Department’s final response in the matter. The Supreme Court held that the PLRA “seeks to ‘afford[d] corrections officials time and opportunity to address complaints internally before allowing the initiation of a federal case.’ ” Woodford v. Ngo, 548 U.S. 81 (2006) (proper exhaustion of administrative remedies is necessary). After approximately 125 days have passed, an inmate will usually have exhausted “such administrative remedies as are available.” 42 U.S.C. § 1997e(a). This action should be dismissed without prejudice to allow Plaintiff the opportunity to file a new suit after exhaustion requirements are met.

Moreover, to the extent that Plaintiff filed this lawsuit to bring about his absolute release from SCDC, this civil action fails to state a cognizable claim. Release from prison is not available in a civil rights action. See Heck v. Humphrey, 512 U.S. at 481 (stating that “habeas corpus is the exclusive remedy for a state prisoner who challenges the fact or duration of his confinement and seeks immediate or speedier release, even though such a claim may come within the literal terms of § 1983”); Johnson v. Ozmint, 567 F. Supp. 2d 806, 823 (D.S.C. 2008) (release from prison is not a remedy available under 42 U.S.C. § 1983).

RECOMMENDATION

Accordingly, the court recommends that the Complaint in the above-captioned case be dismissed without prejudice and without issuance and service of process.

October 5, 2011
Columbia, South Carolina


Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

Plaintiff's attention is directed to the important notice on the next page.

Notice of Right to File Objections to Report and Recommendation

The parties are advised that they may file specific written objections to this Report and Recommendation with the District Judge. Objections must specifically identify the portions of the Report and Recommendation to which objections are made and the basis for such objections. “[I]n the absence of a timely filed objection, a district court need not conduct a de novo review, but instead must ‘only satisfy itself that there is no clear error on the face of the record in order to accept the recommendation.’” Diamond v. Colonial Life & Acc. Ins. Co., 416 F.3d 310 (4th Cir. 2005) (quoting Fed. R. Civ. P. 72 advisory committee’s note).

Specific written objections must be filed within fourteen (14) days of the date of service of this Report and Recommendation. 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b); see Fed. R. Civ. P. 6(a), (d). Filing by mail pursuant to Federal Rule of Civil Procedure 5 may be accomplished by mailing objections to:

Larry W. Propes, Clerk
United States District Court
901 Richland Street
Columbia, South Carolina 29201

Failure to timely file specific written objections to this Report and Recommendation will result in waiver of the right to appeal from a judgment of the District Court based upon such Recommendation. 28 U.S.C. § 636(b)(1); Thomas v. Arn, 474 U.S. 140 (1985); Wright v. Collins, 766 F.2d 841 (4th Cir. 1985); United States v. Schronce, 727 F.2d 91 (4th Cir. 1984).